ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 96-45
Report to Congress on Universal Service	)	(Report to Congress)
Under the Telecommunications Act of 1996	)	

COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.

Vanguard Cellular Systems, Inc. ("Vanguard"), by its attorneys, hereby submits its comments in the above-referenced proceeding.[1/]

I. INTRODUCTION

The Commission has requested comments on its interpretations of the universal service provisions of the Communications Act (the "Act"), as amended by the Telecommunications Act of 1996, in connection with the report on universal service that the Commission is required to submit to Congress by April 10, 1998. Vanguard submits these comments with respect to the second and the fifth issues identified by the Commission, *i.e.*, (i) who is required to contribute to universal service under Section 254(d) of the Act and related existing Federal universal service support mechanisms; and (ii) the Commission's decisions regarding the percentage of universal service support provided by Federal mechanisms and the revenue base from which such support is derived.

1/ *See* Common Carrier Bureau Seeks Comments for Report to Congress on Universal Service Under the Telecommunications Act of 1996, *Public Notice*, CC Docket No. 96-45, DA 98-2 (rel. January 5, 1998). A separate order granted an extension of time for filing comments to January 26, 1998, Federal-State Joint Board on Universal Service, Order, CC Docket No. 96-45, DA 98-63 (rel. January 14, 1998).

II. CONTRIBUTION TO UNIVERSAL SERVICE UNDER SECTION 254(d) OF THE ACT (Question 3).

In previous proceedings, Vanguard already has presented detailed arguments demonstrating that, under Section 332 of the Act, the Commission cannot permit states to require commercial mobile radio service ("CMRS") providers to contribute to state universal service funds but must, rather, treat all CMRS as interstate for purposes of Section 254(d).[2/] In those filings, Vanguard urged the Commission to recognize its original and exclusive substantive jurisdiction over CMRS by virtue of the plain language of Section 254(d) and (f) and the 1993 amendments to Sections 2(b) and 332 of the Act. Based on the language of those provisions (1) CMRS is inherently an interstate service; (2) CMRS providers are required to contribute to only federal universal service mechanisms; and (3) states are preempted from requiring CMRS providers to make intrastate-based universal service contributions. For the reasons set forth below, Vanguard submits that the Commission's determination to the contrary was incorrect and should be corrected.

A. The Language of Section 254 Is Unambiguous.

Section 254(d) of the Act states: "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute ...to the ... mechanisms established by the Commission to preserve and advance universal service", whereas Section 254(f) allows

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2/ Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995, *Memorandum Opinion and Order*, File No. WTB/POL 96-2, FCC 97-343 (rel. October 2, 1997); Vanguard and Comcast Joint Petition for Reconsideration or Withdrawal and Reply to Oppositions, File No. WTB/POL 96-2.

states to administer intrastate universal service programs that deal with intrastate services. These two provisions, taken together, set the bounds for both federal and state universal service funds. They are not, however, the only provisions relevant to the determination of how CMRS providers contribute to the support of universal service, because Section 332 also gives the Commission and the states direction.

Under Section 332(c)(3)(A), CMRS providers are required to contribute to a state universal service funds only when their services *"are a substitute for land line telephone exchange service for a substantial portion of the communications within such State."*[3] Therefore, CMRS providers are, in principle, exempted from making contributions to the state universal service support mechanisms.[4] Their only contribution obligation arises from the unambiguous language of Section 254(d), which requires any telecommunications carriers providing interstate services to contribute to federal universal service mechanisms, unless their participation would be negligible. Indeed, the Commission should have found that all CMRS revenues are interstate in determining the nature of the contribution requirement under Section 254(d).

3/ 47 U.S.C. § 332(c)(3)(A) (emphasis supplied).

4/ It is only when the Commission, after examining evidence presented by the state commission, determines that a CMRS provider offers a substitute for a particular state's land line communications services, that the state is granted the authority to substantively regulate its CMRS providers. No such finding has been made as to any state. In fact, in considering the Bell Atlantic-NYNEX merger, the Commission expressly found that mobile telephone service providers are not currently positioned to offer a substitute for wireline local exchange, because of issues of spectrum availability and other technological and pricing issues. Bell Atlantic - NYNEX, FCC 97-286 at ¶ 90 (rel. August 14, 1997).

B. CMRS Is an Inherently Interstate Service

This statutory reading is confirmed by the nature of CMRS service. It is a well recognized principle that jurisdiction over communications services is to be determined by the nature of communications, not the physical location of the facilities. For instance, a call carried on intrastate facilities is jurisdictionally an interstate communication subject to federal regulation when the call is connected to an interstate network.[5/] CMRS is such a service.

Congress knew of the predominantly interstate nature of mobile radio transmissions when it adopted Section 332(c)(3)(A) in 1993. This understanding is evidenced by the House Report statement that "mobile services...*by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure.*"[6/] The Commission also previously acknowledged the predominantly interstate nature of CMRS services in its *LEC-CMRS Interconnection* proceeding. In the Notice of Proposed Rulemaking in that proceeding, for example, the Commission specifically found that "much of the LEC-CMRS traffic that may appear to be intrastate may actually be interstate, because CMRS service areas often cross state lines and CMRS customers are mobile."[7/]

5/ *See New York Telephone v. FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980). Earlier this century, the Supreme Court concluded that a message starting and ending in the same state is, nevertheless, interstate if it is routed through another state. *Western Union Telegraph Co. v. Speight*, 254 U.S. 17 (1920).

6/ H. R. Rep. No. 213, 103rd Cong., 1st Sess. 490 (1993) (emphasis supplied).

7/ Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *Notice of Proposed Rulemaking*, 11 FCC Rcd 5020, 5073 (1996).

While the Commission ultimately determined that because of its interrelated nature that the CMRS-LEC interconnection rulemaking should be resolved as part of the implementation of LEC interconnection provisions contained in the 1996 Act, it did not question its previous jurisdictional tentative conclusions. Indeed, the Commission acknowledged in its *Local Competition Order*, that "section 332 in tandem with section 201 is a basis for jurisdiction over LEC-CMRS interconnection."[8/] Even the Eighth Circuit order that vacated key portions of the FCC's broader interconnection initiatives recognized the special nature of the FCC's jurisdiction over CMRS.[9/] Specifically, the court concluded that:

> [b]ecause Congress expressly amended section 2(b) to preclude state regulation of entry of and rates charged by . . . CMRS providers, *see* 47 U.S.C. §§ 152(b) (exempting the provisions of section 332), 332(c)(3)(A), and because section 332(c)(1)(B) gives the FCC authority to order LECs to interconnection with CMRS carriers, we believe that the Commission has the authority to issue the rules of special concern to the CMRS providers.[10/]

8/ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order*, CC Docket. No. 95-185, 11 FCC Rcd 15499 ¶ 1023 (rel. Aug. 8, 1996), *aff'd in part and vacated in part sub nom., Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *aff'd in part and vacated in part sub nom,. Iowa Pub. Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *Order on Reconsideration*, 11 FCC Rcd 13042, *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996). *Third Order on Reconsideration and Further Notice of Proposed Rulemaking,* FCC 97-295 (rel. Aug 18, 1997), *further recon. pending*.

9/ *Iowa Pub. Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997).

10/ *Id*. at n. 21. As a result of this holding, the court upheld the FCC's CMRS-specific rules relating to the scope of CMRS local calling areas, the prohibition of certain LEC-to-CMRS charging practices, the requirement that rates between LECs and CMRS providers be symmetrical, the ability of states to "true-up" local transport and termination

(continued...)

These legal justifications for classifying CMRS as an interstate service are confirmed by the practical problems of attempting to identify or classify wide area wireless traffic as intrastate, including the fact that the mobile nature of the service can cause a call that begins as "intrastate" to become "interstate" as one party crosses a state border during the call.[11/] Thus, determining what portion of CMRS traffic (and related revenue) is "interstate" in nature becomes an artificial and arbitrary process. A more logical approach, and one accurately reflecting the state of the law, would be to recognize explicitly CMRS as a wholly interstate service and treat CMRS traffic and revenues accordingly.[12/] Therefore, the imposition of state universal service levies on inherently interstate telecommunications services of interstate carriers such as CMRS providers cannot be a lawful state regulatory activity, unless CMRS services constitute a substitute for land line telephone exchange services under the plain parenthesized language of Section 332(c)(3)(A).

10/ (...continued)
charges once permanent rates are in place, and the FCC's rules governing the renegotiation of non-reciprocal LEC-to-CMRS interconnection agreements.

11/ Additionally, the MTA-wide "local" calling areas the FCC established for CMRS providers are typically very large regional areas encompassing several states, so that CMRS providers often provide interstate services with wide area interstate "local" calling areas. Congress in 1993 also took account of this fact by exempting section 332 CMRS services from the scope of section 221(b), which limits FCC jurisdiction with respect to state practices or regulations in connection with wire, mobile, or point-to-point radio telephone exchange service even if a portion of such exchange service constitutes interstate or foreign communication.

12/ *See Comcast/Vanguard Universal Service Petition* at 10.

C. The Commission's Interpretation of Section 332(c)(3) Violates Section 254(d).

Sections 2(b) and 332 of the Act explicitly eliminate the states' substantive jurisdiction over wireless telecommunications services. Indeed, Congress's express purpose in revising Sections 2(b) and 332 under the 1993 Budget Act was to create a uniform federal framework for the regulation of CMRS.[13] The 1996 Act confirmed that these sections continue in full effect. Under the Section 601(c)(1) 1996 Act amendment, neither the Act itself, nor the amendments made by the Act shall be interpreted to modify, impair or supersede federal, state or local law unless expressly provided in such Act or amendments.[14]

Therefore, by permitting states to assess universal service obligations on "intrastate" CMRS services, the Commission's ignores the parenthetical language of Section 332(c)(3)(A), which requires a CMRS provider to be adjudged a substitute for land line service before becoming subject to state universal service requirements. It also misconstrues the inherently interstate nature of CMRS services as articulated by Congress and the consistent federal regulatory framework established by Congress for CMRS in 1993 and left undisturbed in 1996.

As a result, the Commission's determination that states are permitted to impose universal service obligations on CMRS providers also violates the provisions of Section 254

13/ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312 (1993). H.R. Rep. No. 213, 103rd Cong., 1st Sess. 497 (1993). The Supreme Court already ruled that Section 2 contains a broad rule of statutory construction. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. at 372-74.

14/ 1996 Act § 601(c)(1), 110 Stat. at 143 (1996) under which interstate services are subject to federal universal service obligations and only intrastate services are subject to state universal services obligations.

III. UNIVERSAL SERVICE SUPPORT PROVIDED BY FEDERAL MECHANISMS AND REVENUE BASE (Question 5).

Vanguard has decided to pass on the cost of contributing to the federal universal service mechanism to its customers, as it is entitled to under the *Universal Service Order*.[15] Because Vanguard, unlike interexchange carriers, did not experience any reductions in its costs as a result of the *Universal Service Order* and the *Access Reform Order*, it had little choice but to do so as a line item on its customer bills.[16] So that customers would be aware of the basis for the new charge, Vanguard has informed its customers, as permitted under the Commission's rules of the new charge in bill inserts.

As a result of this initiative, Vanguard has received thousands of calls from customers expressing significant questions and concerns about the new costs that are being passed on to them. It appears that customers see the additional charge corresponding to the universal service obligation as a significant burden.

These concerns have created significant difficulties for Vanguard as a service provider. As noted above, for Vanguard the universal service assessment is not one element of a trade-off in which implicit subsidies (*i.e.* high access charges) are replaced by explicit

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15/ Federal State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd 8776, 9198 (1997) at ¶ 824-829 (*Universal Service Order*).

16/ This is particularly the case because, as a practical matter, Vanguard is unable at this time to recover any money from the universal service fund.

subsidies (*i.e.*, universal service assessments). Rather, universal service assessments reflect a new cost of business. Vanguard must attempt to recover that cost in any way it can. The net effect of the Commission's rules, therefore, has been to shift universal service costs from long distance carriers to other service providers, including CMRS providers, without any corresponding benefits to these other providers. The Commission should address this issue in its report to Congress.

IV. CONCLUSION

For the reasons described above, the Commission should include these matters in its report to Congress.

Respectfully submitted,

VANGUARD CELLULAR SYSTEMS, INC.

By: ______________________

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CERTIFICATE OF SERVICE

I, Vicki Lynne Lyttle, a secretary at Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 26th day of January, 1998, a copy of the foregoing "Comments of Vanguard Cellular Systems, Inc." was sent by hand delivery to the following:

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